



July 17, 2001

Mr. Paul C. Sarahan
Director
Litigation Law Division
Texas Natural Resource Conservation Commission
P.O. Box 13087
Austin, Texas 78711-3087

OR2001-3093

Dear Mr. Sarahan:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 149474.

The Texas Natural Resource Conservation Commission (the "commission") received a request for all files maintained by the commission related to complaints, inspections, violations and/or enforcement actions taken by the commission concerning waste and wastewater treatment plants operated by American Wastewater, U.S. Liquids, Inc., U.S. Liquids of Texas, Inc., U.S. Liquids of Houston, L.L.C., U.S. Liquids of Central Texas, and U.S. Liquids of Dallas. You inform us that the commission has made available a part of the information requested, but claim that the remainder of the requested information is excepted from disclosure under sections 552.101 and 552.103 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted representative sample of information.²

¹We note that the commission initially raised section 552.111 as an exception to disclosure of the requested information. However, the commission made no arguments in support of their section 552.111 assertion. Therefore, the requested information may not be withheld under this exception. See Gov't Code §§ 552.301(e), .302.

²We assume that the "representative samples" of records submitted to this office are truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

We first note that the submitted documents contain information subject to section 552.022 of the Government Code. Section 552.022 provides that

the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

...

(18) a settlement agreement to which a governmental body is a party.

Gov't Code § 552.022(a)(18) (emphasis added). The submitted information includes a settlement agreement in the form of an Agreed Order. The commission argues that this agreement is among the information excepted from disclosure under section 552.103. Section 552.103 is a discretionary exception and not "other law" for purposes of section 552.022.³ Therefore, the commission may not withhold this agreement, which we have marked with a green flag, under section 552.103.

We next address your argument under section 552.103, which states in pertinent part:

(a) Information is excepted from the requirements of Section 552.021 if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

....

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

To secure the protection of section 552.103(a), a governmental body must demonstrate that the requested information "relates" to a pending or reasonably anticipated judicial or quasi-judicial proceeding. Open Records Decision No. 588 (1991). A governmental body has the burden of providing relevant facts and documents to show the applicability of an

³Discretionary exceptions are intended to protect only the interests of the governmental body, as distinct from exceptions which are intended to protect information deemed confidential by law or the interests of third parties. See, e.g., Open Records Decision Nos. 630 at 4 (1994) (governmental body may waive attorney-client privilege, section 552.107(1)), 592 at 8 (1991) (governmental body may waive section 552.104, information relating to competition or bidding), 522 at 4 (1989) (discretionary exceptions in general). Discretionary exceptions therefore do not constitute "other law" that makes information confidential.

exception in a particular situation. The test for establishing that section 552.103(a) applies is a two-prong showing that (1) litigation was pending or reasonably anticipated on the day the governmental body received the request for information, and (2) the information at issue is related to that litigation. *University of Texas Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479 (Tex. App.--Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.). For purposes of section 552.103(a), this office considers a contested case under the Texas Administrative Procedure Act ("APA"), Government Code chapter 2001, to constitute "litigation." Open Records Decision No. 588 at 7 (1991) (construing statutory predecessor to the APA).

You inform us that the commission has an enforcement action pending against U.S. Liquids, and that "[w]hile there is a possibility that this enforcement action may be settled, there is also a strong possibility that litigation may ensue in view of the continuous refusal of the facility to remedy the problem." After reviewing your arguments and the submitted documents, we conclude that litigation was reasonably anticipated on the date the commission received the records request. We also find that the submitted information is related to the anticipated litigation for the purposes of section 552.103(a). Therefore, other than as noted above, the requested information may be withheld from disclosure pursuant to section 552.103.

Generally, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party is not excepted from disclosure under section 552.103(a).⁴ In this regard, we note that several of the documents you seek to withhold under section 552.103 have been seen by the adverse party in the anticipated litigation. Therefore, these documents, which we have marked with a green flag, may not be withheld under section 552.103. As these documents contain no information excepted under the informer's privilege aspect of section 552.101, the only other exception you raise for this information, they must be released to the requestor.

To summarize, the commission may withhold the submitted information under section 552.103, with the exception of the Agreed Order, which must be released under section 552.022(a)(18), and the information seen by the adverse party in the anticipated litigation. As we resolve your request under section 552.103, we need not address your informer's privilege argument, except to note that the information to be released contains no information made confidential by the informer's privilege.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

⁴Further, the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in cursive script, reading "Michael A. Pearle".

Michael A. Pearle
Assistant Attorney General
Open Records Division

MAP/seg

Ref: ID# 149474

Enc. Submitted documents

c: Ms. Karen B. Pettigrew
99 North Post Oak Lane, Suite 6302
Houston, Texas 77024
(w/o enclosures)